Tentative Rulings for June 16, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG00163 ***Rose v. Healthcomp, Inc.*** **is continued to Thursday, July 14, 2016, at 3:30 p.m. in Dept. 501.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

2)

Tentative Ruling

Re: ***Ramos v. Gonzalez et al.***
Superior Court Case No. 15CECG02826

Hearing Date: June 16, 2016 (Dept. 402)

Motion: Petitions to Compromise Minors' Claims

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 6/15/16 .
(Judge's initials) (Date)

Tentative Rulings for Department 403

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Peredia v. HR Mobile Services, Inc., et al.***
Superior Court Case No. 13CECG03137

Hearing Date: **June 16, 2016 (Dept. 501)**

Motion: Defendant HR Mobile Services, Inc.'s Motion for Summary Judgment or Adjudication

Tentative Ruling:

To grant the motion for summary judgment. (Code Civ. Proc. § 437c(c).)

Explanation:

"'Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" (*Lopez v. Superior Court* (1996) 45 Cal.App.4th 705, 713, quoting Code Civ. Proc. § 437c, subd. (c).) To prevail in a motion for summary judgment, it is defendant's burden to prove there is a complete defense or that plaintiff cannot establish one or more elements of each of his causes of action. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

Plaintiffs assert negligence wrongful death and survival causes of action arising from the death of their son while working at Double Diamond Dairy ("DDD"). DDD had an injury and illness prevention program ("IIPP") since its inception in 1998. (UMF 4, 5.) DDD retained HR to assist it in carrying out its workplace safety obligations, including being responsible for quarterly safety meetings, quarterly site safety inspections, accident investigations, and safety training. (UMF 8, 9.) HR began rendering services to DDD in July 2012. (UMF 13.) Decedent was killed a few months later on September 22, 2012 when he was run over by a front-loader being operated by DDD employee Ector Carillo around 6:30 a.m.

Pursuant to its agreement with DDD, HR obtained from Boretti, a vendor to HR, a form IIPP, which was not altered in any way for DDD because HR believed it to comply with California's basic statutory and regulatory requirements for dairy IIPPs. HR did not recommend any changes in Double Diamond's practices under its prior IIPP when it supplied DDD with the Boretti form IIPP. (UMF 15-17.)

HR conducted an initial job site safety inspection at DDD on August 24, 2012, which was attended by Carillo. (UMF 20, 23.) Though the meeting covered front-end loader safety, the specifics of the information conveyed is not set forth in the separate statement. (UMF 24, 25.)

Plaintiffs' assert that HR's acts and omissions were a substantial factor in causing the death of decedent, by:

1. Failing to design and create a safety program that would address the safety of ground workers in the vicinity of heavy equipment Operations.
2. Failing to institute and execute a program that included use of high visibility clothing for the workers at Double Diamond Dairy.
3. Failure to institute a program or negligent institution of meetings prior to shifts where heavy equipment was to be used to alert heavy equipment operators and ground workers of the presence of each other in the vicinity.
4. Failing to educate or incomplete education of workers about the dangers of heavy equipment and the necessity to communicate with heavy equipment workers to learn their location and present {sic} in the vicinity.
5. Failure to institute a radio program or other communication system between heavy equipment operators and ground workers so that they are able to speak to each other in real time and learn their respective locations.
6. Failing to or negligent communication with Double Diamond Dairy to inform it that its equipment had blind spots and inadequate warning devices.
7. Inadequate and negligent management of its responsibilities as set forth in the IIPP.

(UMF 1.)

The causes of action for "Negligence, Wrongful Death" and "Negligence, Survival", are both at their core negligence causes of action. Under either theory, the plaintiff grounding their claim on negligence must establish the elements of that common law tort. (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105.) "Negligence involves the violation of a legal duty imposed by statute, contract or otherwise, by the defendant to the person injured, e. g., the deceased in a wrongful death action." (*Id*., citing *Natty v. Grace Community Church* (1988) 47 Cal.3d 278, 292.)

As the employer, it was DDD's duty to ensure a safe place of employment (Lab. Code § 6403), including a duty to establish, implement and maintain an IIPP (Lab. Code § 6401.7, 8 Cal. Code Regs. § 3203(a)).

Civil Code section 2343 precludes liability for HR under the circumstances of this case: "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, **and in no others** … 3. When his acts are wrongful in their nature." (Emphasis added.)

Given DDD's statutory duty to ensure a safe place of employment and have an IIPP, and the nature of the relationship between DDD and HR, it is apparent that HR acted as DDD's agent with regards to its workplace safety services and the IIPP. Under Civil Code section 2343 it cannot be held liable unless its acts were wrongful in their

nature. Liability under this provision requires a showing of affirmative misfeasance – an agent is not liable to third parties for failure to perform duties owed to his principal, including any contractual duty "to monitor safety at the worksite." (*Ruiz v. Herman Weissker* (2005) 130 Cal.App.4th 52, 65.) Passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. (*Hooker v. Dept. of Trans.* (2002) 27 Cal.4th 198, 214-215.) Here, at most, HR passively and negligently failed to identify and correct dangerous working conditions at DDD. None of the alleged failures constitute affirmative misfeasance. Accordingly, Civil Code section 2343 precludes liability for HR based on its acts as DDD's agent.

Plaintiffs contend that their causes of action are not limited by Civ. Code § 2343; regardless of section 2343 they can proceed with a regular negligence claim. Plaintiffs cite to no authority for this proposition. Based on the preclusive language of the statute ("and in no others"), the court finds that HR cannot be held liable in this case.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/15/16.

(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Gutierrez v Karing 4 Kids***
Court Case No. 13CECG03134

Hearing Date: June 16, 2016 (Department 501)

Motion: by plaintiff to enforce settlement agreement

Tentative Ruling:

To deny.

Explanation:

The filings made by defendant demonstrate a good faith attempt to secure approval of the settlement by the Board.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 6/14/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Ferguson et al. v. Baumeister, Inc. et al.***
Superior Court Case No. 15 CECG 01723

Hearing Date: June 16, 2016 (**Dept. 501**)

Motion: Demurrer to the Second Amended Complaint by Defendant the City of Clovis

Tentative Ruling:

To overrule the general demurrer to the ninth cause of action. An Answer is to be filed within 10 days of notice of the ruling. Notice from the date that the Clerk mails the Minute Order plus 5 days for service via mail. [CCP § 1013]

Explanation:

"Chain Letter" Pleading

Despite the admonition in the previous ruling, the Second Amended Complaint STILL sets forth a "narrative" at ¶¶ 11-24 under the heading "Factual Allegations". Then, "like a chain-letter", these allegations are incorporated by reference into **each** of the causes of action. See ¶¶ 25, 30, 36, 41, 46, 51, 56, 61, 67 and 74. This method of pleading has been criticized as creating **ambiguity** and **redundancy**. See *International Billing Services, Inc. v. Emigh (2000)* 84 Cal.App.4th 1175, 1179 and *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605. However, it has not affected the pleading of the ninth cause of action.

Ninth Cause of Action

CACI 3003 Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [he/she] was deprived of [his/her] civil rights as a result of [*name of local governmental entity*]'s failure to train its [officers/employees]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of local governmental entity*]'s training program was not adequate to train its [officers/employees];
2. That [*name of local governmental entity*] knew because of a pattern of similar violations [, or it should have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [*specify right violated*];
3. That [*name of officer or employee*] violated [*name of plaintiff*]'s right [*specify right*]; and
4. That the failure to provide adequate training was the cause of the deprivation of [*name of plaintiff*]'s right [*specify right*].

In the case of *City of Canton v. Harris* (1989) 489 U.S. 378, 388-389 [109 S.Ct. 1197, 103 L.Ed.2d 412], the United State Supreme Court stated: "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (internal citations and footnote omitted.)

Recently, the First District Court of Appeal opined: "The ninth cause of action was for 'Failure to Train.' The elements of such cause of action are well established, and include that the City 'knew because of a pattern of similar violations that the inadequate training was likely to result in a deprivation' of some right of plaintiffs. Put otherwise, the inadequate training must amount to a deliberate indifference to constitutional rights. Such deliberate indifference requires proof of a pattern of violations (except in those few very rare situations in which the unconstitutional consequences of failing to train are patently obvious)." (*Squires v. City of Eureka* (2014) 231 Cal.App.4th 577, 597 [180 Cal.Rptr.3d 10], footnote and internal citations omitted.)

Merits

The gravamen of the ninth cause of action is that it was the custom of the City of Clovis (through its Police Department) to arrest persons on misdemeanor charges that had not been committed in the presence of the officer. See Second Amended Complaint at page 15 at ¶ 68 lines 6-11. Plaintiffs base their theory of liability upon Penal Code § 836. See ¶ 69 page 16 line 2. In its demurrer, the Defendant focuses upon language from the cases it cites as support instead of examining the language of the ninth cause of action. Plaintiff alleges at ¶¶ 68-69:

> The City of Clovis had a custom, policy or practice of (l) failing to train its officers that investigation into allegations to substantiate arrest must be established when there are contradictory eye—witnesses statements; and (2) failing to train its officers that a misdemeanor arrest cannot be based on reports of activity that occurred outside of an officer's presence, except in limited circumstances inapplicable here. Plaintiffs are informed and believe that a review of the historical reports of arrests by Clovis officers for minor offenses such as those listed above will corroborate these allegations.
>
> These customs, policies and/or practices were the moving force behind the false arrest that resulted in a violation of plaintiff Ferguson's Fourth Amendment right not to be arrested except upon probable cause. Specifically, the information available to the Clovis officers did not support a finding of probable cause, since they had the ability to perform a

> reasonable investigation under the circumstances and. the exculpatory facts were readily available showing that probable cause was lacking and that the information provided by Old Town Saloon personnel was false. Indeed, the plaintiffs, their companions, other eye witnesses and traffic camera video footage were available to dispute the allegations of the Old Town Saloon personnel upon whose word the arrest was based. Police officers are constitutionally required to perform a reasonable investigation under the circumstances, and taking the uncorroborated word of the perpetrators, i.e., the Old Town Saloon personnel, who could well have been the perpetrators, did not comport with those standards. Moreover, plaintiff Ferguson was cited and arrested for a misdemeanor which did not occur in the Clovis officers' presence, so they had no constitutional authority to arrest the plaintiff under Penal Code § 836. In all of these respects, plaintiff Ferguson was unconstitutionally arrested by the Clovis officers.

The making of invalid arrests would constitute a deliberate indifference to the constitutional right of person to be free from seizure by police without probable cause. The failure of the City of Clovis to train its officers to examine all available evidence in forming a "reasonable belief" as to whether a misdemeanor has been committed would appear to constitute "deliberate indifference." See *City of Canton*, supra. Given that the Plaintiff has abandoned language that caused ambiguity in the ninth cause of action alleged in the First Amended Complaint, the general demurrer will be overruled. While the cause of action is not a "model of pleading clarity", there are sufficient facts pleaded to constitute a cause of action for a violation of 42 USC § 1983 on a failure to train theory.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/14/16.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Weidenbach v. Scott et al.***
Court Case No. 16 CECG 00394

Hearing Date: June 16, 2016 (Dept. 501)

Motion: Guarantee Real Estate's & Melissa Schroder's Motion for Determination of Good Faith Settlement

Tentative Ruling:

To deny.

Explanation:

The court has read and considered the supplemental filings of counsel following the May 26, 2016 hearing.

Under Code of Civil Procedure section 877.6, a settlement entered by one or more of several joint tortfeasors may be determined by the court to be in "good faith." If the court does so, this bars any other joint tortfeasor from any further claims against the settling defendant for equitable comparative contribution, equitable indemnity or comparative fault.

In considering a motion under Section 877.6, courts are called upon to balance the statute's twin goals of (1) encouragement of settlements, and (2) equitable sharing of costs among the parties at fault. (*Tech-Bilt v. Woodward-Clyde & Assoc*. (1985) 38 Cal.3d 488, 494 (*Tech-Bilt*).) The standard is whether the amount of the settlement is within the "reasonable range" or "ballpark" of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries. (*Id*. at. p. 499.) "In order to encourage settlement, it is quite proper for a settling defendant to pay less than his proportionate share of the anticipated damages...What is required is simply that the settlement not be grossly disproportionate to the settlor's fair share". (*Abbott Ford, Inc. v. Superior Court* (1987) 43 Cal.3d 858, 874.) "And even where the claimant's damages are obviously great, and the liability therefor certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent, and uninsured, or underinsured joint tortfeasor." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.)

Factors:

Tech-Bilt provided the following non-exclusive list of factors for the court to consider in determining the "good faith" of a settlement: "A rough approximation of plaintiff's total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, and a recognition that a settlor should pay less in settlement than he would if he were found liable after a trial." (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.) "Other relevant considerations include the

financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants". (*Ibid*.). "Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement." (*Ibid*.)

Moving Party's Burden:

The moving-party's initial evidentiary burden depends on whether the 'good faith' of the settlement is being contested. If the nonsettling defendants do not oppose the motion on the good faith issue, a 'barebones' motion which sets forth the grounds of good faith, accompanied by a declaration which sets forth a brief background of the case, is sufficient. (*City of Grand Terrace v. Superior Court* (1987) 192 Cal.App.3d 1251, 1261; Rylaarsdam & Edmon, *Cal. Practice Guide: Civil Procedure Before Trial*, (The Rutter Group 2014) § 12:871-12:872.) But, as here, where the nonsettling defendants contest 'good faith', the moving party must make a more specific showing under the *Tech-Bilt* factors. Such showing may be made either in the original moving papers or in counter-declarations filed after the nonsettling defendants have filed an opposition challenging good faith of the settlement. (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1262; Rylaarsdam & Edmon, *supra*, § 12:872). Where good faith is contested, the showing requires competent evidence in support of "good faith." (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834.)

Code of Civil Procedure section 877.6, subdivision (d) states that "the party asserting the lack of good faith shall have the burden of proof on that issue."

The Showing

1. Plaintiff's Total Recovery

Plaintiffs claimed a recovery of "not less than $100,000" for both out of pocket and loss of use damages in their complaint. At paragraph 11 in his declaration, Guarantee's counsel states that he has two bids that plaintiffs' counsel gave him in connection with the pre-litigation mediation that total $80,649.77. He also has an estimate from his own expert for "approximately $22,000."

Guarantee claims its expert's declaration and estimate are "uncontested." While that may be, they are not conclusive on the issue of plaintiffs' recovery. Although the declaration of John Genito does conclude that the damage estimates of $80,649.77 presented by plaintiffs at the mediation are inflated, due in part by duplication of work, Genito's estimate of "approximately $22,000" is unsupported by a written bid, making it impossible to compare it to the two estimates provided by plaintiffs. Thus, the foundation for Genito's conclusion is lacking.

While it is true that a court can only evaluate a settlement based on what is known at the time of the settlement and not at a later date (*Tech-Bilt*, *supra*, 38 Cal.3d at p. 499), it is also true that the party moving for a determination of good faith must give the court competent evidence of what the defendants' total maximum exposure

is. (*Greshko v. County of Los Angeles*, *supra*, 194 Cal.App.3d at p. 834.) This has not been done.

2. Proportionate Liability

"The ultimate determination of good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be." (*City of Grand Terrace v. Superior Court*, *supra*, 192 Cal.App.3d at p. 1262.) The court must consider not only the settling parties' liability to the plaintiff but also their proportionate share of culpability as among all parties alleged to be liable for the same injury. (*TSI Seismic Tenant Space, Inc. v. Superior Court* (2007) 149 Cal.App.4th 159, 166-167.) This is because a good faith determination bars indemnity claims by non-settling parties, thus the true value of the settlement to the settler may not be the amount paid plaintiff but the value of the shield against such indemnity claims. (*Ibid*.)

Factual declarations and admissible evidence showing the nature and extent of the settling defendant's liability are required. Without such evidence, a "good faith" determination is an abuse of discretion. (*Mattco Forge, Inc. v. Arthur Young & Co*. (1995) 38 Cal.App.4th 1337, 1348.)

The causes of action directed at Schroder and Guarantee are the second cause of action for negligent misrepresentation and the Third cause of action or Violation of Civil Code section 1102 et seq. The cause of action for negligent misrepresentation will depend on evidence that Schroder was the one who had a duty to disclose the mold or water intrusion as opposed to the Scotts. Guarantee and Scott contend that the law and the contract put the duty squarely on the Scotts, however, the fact remains the Schroder changed sides during escrow and as an agent for the plaintiffs' agency, had a duty to reveal the water intrusion. As for the claim under Civil Code section 1102 et seq., Guarantee and Schroder argue that this statutory scheme only requires a diligent visual inspection of areas reasonably and normally accessible. Here arguably the mold and water damage was hidden, and the grading was disclosed in the report made available to plaintiffs by their own inspection, thus liability to plaintiffs is uncertain.

However, liability to plaintiffs is not the only consideration. Schroder changed sides during the transaction without obtaining the Scotts' consent or a dual agency disclosure. She also initially advised the Scotts to not disclose the water damage and mold. She owed a fiduciary duty to the Scotts. (*Michel v. Palos Verdes Network Group, Inc*. (2007) 156 Cal.App.4th 756, 762–763.) Moreover JMS has claims against Schroder for not disclosing what she knew about the water damage and mold once she came to work for that company.

These claims against Schroder and Guarantee could potential include the value of the attorney's fees incurred in defending against the plaintiffs' lawsuit under the "tort of another theory" or indemnity.

Accordingly, the claims by JMS and the Scotts against Guarantee and Schroder are greater than plaintiffs' against Guarantee and Schroder.

3. Amount Paid in Settlement

The settlement totals $25,000.

4. Recognition that Settlor Should Pay Less

While the settling defendants will pay less, and here the settlement with plaintiffs may be a fair share of plaintiffs' liability, it does not appear to be a fair allocation of the liability between the non-settling defendants.

5. Settlor's Financial Condition and Insurance Policy Limits

There is no evidence of Guarantee's insurance or general financial condition, or of Schroder's insurance or financial condition. Nor is there any indication as to whether Guarantee will be defending Schroder. It is telling that Guarantee's counsel's papers continue to bear the marking "Melissa Schroder, In Pro Per," suggesting that they are filed on Ms. Schroder's behalf, yet they are unsigned by her.

Plaintiffs' counsel has taken it on himself to chide the Court for consideration of this factor on the grounds that it is improper to consider insurance or financial condition because insurance is not admissible evidence of liability. Evidence of insurance and financial condition is only considered under the mandate of the Supreme Court set forth in *Tech-Bilt*, *supra*, 38 Cal.3d at p. 499.

6. Evidence of Collusion, Fraud, or Tortious Conduct

This remains a significant factor. Even though the contract between the plaintiffs and the Scotts required mediation, and case law requires mediation if attorney's fees are to be recovered, there is compelling evidence that plaintiffs are taking a divide and conquer approach to this litigation by settling with the insured professional parties to whom the Scotts might have recourse. Plaintiffs' counsel's October 16, 2015, letter requesting Guarantee mediate states "[a]s you know, I make it a practice not to sue agents who work for Guarantee Real Estate." One then questions why Guarantee and Schroder were named at all, if not to obtain a quick settlement in return for eliminating significant liability in indemnity.

In short, the settlement appears collusive. The court in *Long Beach Memorial Medical Center v. Superior Court* (2009) 172 Cal.App.4th 865, had the following to say about collusion in settlements: "As explained, '[s]ection 877.6 is grounded in the equitable policies of the "encouragement of settlements and the equitable allocation of costs among multiple tortfeasors." [Citation.]' [citation.] 'The good faith provision of section 877 "mandates that the courts review agreements purportedly made under its aegis to insure that such settlements appropriately balance the contribution statute's dual objectives.... 'Lack of good faith encompasses many kinds of behavior. It may characterize one or both sides to a settlement. When profit is involved, the ingenuity of man spawns limitless varieties of unfairness....' " [Citation.]' [Citation.] Here, the conclusion is inescapable that the physicians' offer was tactical and did not reflect the

cooperative decision-making among all interested parties that is one of the aims of settlements. [Citation.] ' "[A] settlement, to the extent that it is dictated by the tactical advantage of removing a deep-pocket defendant ... is not made in 'good faith' consideration of the relevant liability of all parties....' [Citation.]' " (*Id*. at pp. 876-877.)

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 6/15/16.
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

(24) **Tentative Ruling**

Re: ***Bowerman v. Ralph Neate Extended Care Center***
Court Case No. 15CECG02119

Hearing Date: **June 16, 2016 (Dept. 503)**

Motion: 1) Defendant Leonel Apodaca, M.D.'s Demurrer to the First Amended Complaint
2) Defendant Leonel Apodaca's Motion to Strike the First Amended Complaint

Tentative Ruling:

To take the demurrer off calendar for failure of moving party to comply with Code of Civil Procedure Section 430.41, subdivision (a). The parties are ordered to meet and confer pursuant to the statute and, if necessary, to calendar a new hearing date for a demurrer. Any new hearing date must be obtained pursuant to Fresno County Superior Court Local Rules, rule 2.2.1. As any ruling on the Motion to Strike depends on the ruling on demurrer, it is also ordered off calendar.

Explanation:

Defense counsel, Bethany Peak, clearly did not comply with the meet and confer requirements of Code of Civil Procedure section 430.41. Her declaration describes an initial conversation with David Moeck regarding "the primary perceived deficiency" with which she was concerned, which was resolved. Then, a week later, she again called Mr. Moeck's office and upon being told he was out of the office for the day, she left him a voicemail telling him she had discovered another "perceived deficiency" and would be filing a Demurrer, and she filed this demurrer the next day.

This is insufficient. The first meet and confer effort, which was resolved, did not obviate the need to again meet and confer about new issues prior to filing a demurrer. Ms. Peak appears to realize this, since she at least attempted contact. But one telephone call and leaving a voicemail is not meeting and conferring. Nor do the facts implicate any failure to respond to a meet and confer request, or failure to meet and confer in good faith, on the part plaintiff's counsel. (Code Civ. Proc., § 430.41, subd. (a)(3)(B).) Indeed, Ms. Peak's voicemail did not even provide opportunity for Mr. Moeck to respond, since she merely informed him that she would be filing the demurrer the next day.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this

ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/10/16 .
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: **Vasquez, et al. v. Jackson, et al.**

Case No. 15CECG01889

Hearing Date: June 16, 2016 (Dept. 503)

Motion: By Defendants Lester and Sylvia Jackson, individually and jointly doing business as S&L Trucking for leave to file cross-complaint.

Tentative Ruling:

To grant. Defendants may file and serve the cross-complaint attached to their moving papers in accordance with the applicable statutes.

Explanation:

[The Court notes that no opposition or reply briefs appear in the Court's files.]

Defendants Lester and Sylvia Jackson, individually and jointly doing business as S&L Trucking, have filed a request for leave to file a Cross-Complaint against Plaintiff Miguel Vasquez (and Roes 1 to 10).

The underlying lawsuit is one for general negligence and for negligence stemming from "permissive use of vehicle" against defendants for allegedly causing a traffic accident in Fresno County.

The proposed cross-complaint is for equitable indemnity and apportionment of liability.

The motion is based on Defendants' argument that the accident did not occur as Plaintiffs have alleged and that, in fact, Plaintiff Vasquez is "a cause of the incident...from which this lawsuit arises."

If a party seeks to file a cross-complaint that is compulsory in nature, leave must be granted so long as defendant is acting in good faith. (Code Civ.Proc. §426.50.) Even where the proposed cross-complaint is permissive, leave of court may be granted "in the interests of justice" at any time during the course of the action. (Code Civ.Proc. §428.50, subd. (c).) A claim is compulsory if it is related to the subject matter of the complaint. (Code Civ.Proc. §426.30; *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75 Cal.App.4th 1310, 1313-14.)

Here, Defendants seek to file a claim for equitable indemnity based on their contention that Plaintiff Vasquez contributed to the car accident that is the basis for the underlying complaint. "Cross-complaints for comparative equitable indemnity would appear virtually always transactionally related to the main action." (*Time for Living, Inc. v. Guy Hatfield Homes/All American Develop. Co.* (1991) 230 Cal.App.3d 30, 38.) Thus, this cross-complaint is compulsory and leave must be granted so long as the Defendant are acting in good faith. There is no opposition and nothing that appears from the record to constitute a lack of good faith. Therefore the motion is granted. Defendants have leave to file and serve the cross-complaint submitted with their papers in accordance with the applicable statutes.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/15/16 .

(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Donald Fagan, Jr. et al. v. Ronald A. McBride et al.***
Superior Court Case No. 16 CECG 03900

Hearing Date: June 16, 2016 **(Dept. 503)**

Motion: By Defendants to strike claim for punitive damages

Tentative Ruling:

To deny the motion to strike the claim for punitive damages.

Explanation:

Background

Plaintiffs are tenants in apartment buildings located at 3919-3959 N. Clark Street in Fresno. The complex is known as Manchester Gardens. According to the internet, it was built in 1962 and has 57 units with 2 stories. It is located to the west of Hwy 41 between Dakota and Ashlan Avenues. It was owned by the Defendants from 2003 to August 6, 2015.

Plaintiffs allege that there are various defects that have rendered their apartments uninhabitable. On December 24, 2015, they filed a complaint alleging five causes of action. On March 16, 2016, the Court denied the Defendants' motion to strike the "litany" of defects alleged but granted the motion to strike the claim for punitive damages with leave to amend.

On April 13, 2016, Plaintiffs filed a First Amended Complaint. It alleges four causes of action:

1. Failure to provide habitable dwelling;
2. Breach of covenant right to quiet enjoyment and possession of the property;
3. Nuisance; and
4. Negligence.

On May 10, 2016, Defendants filed an Answer and a motion to strike the claim for punitive damages. No opposition has been filed.

Motion at Bench

A motion to strike punitive damages allegations may lie where the claim sued upon would not support an award of punitive damages *as a matter of law:* e.g., straight promissory note actions; claims against governmental entities, etc. [See Civil Code § 3294(a); *Commodore Home Systems, Inc. v. Sup.Ct. (Brown)* (1982) 32 Cal.3d 211, 214-

215] Additionally, a motion to strike may lie where the facts alleged do not rise to the level of "malice, fraud or oppression" required to support a punitive damages award. [See *Turman v. Turning Point of Central Calif., Inc.* (2010) 191 Cal.App.4th 53, 63—allegations of gender discrimination did not show defendant acted with requisite state of mind for punitive damages]

As a matter of law, it is not sufficient to allege merely that defendant "acted with oppression, fraud or malice." Rather, plaintiff must allege *specific facts* showing that defendant's conduct was oppressive, fraudulent or malicious (e.g., that defendant acted *with the intent* to inflict great bodily harm on plaintiff or to destroy plaintiff's property or reputation). [See *Smith v. Sup.Ct. (Bucher)* (1992) 10 Cal.App.4th 1033, 1041-1042; *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643—allegations that defendant's conduct was intentional, willful, malicious, performed with ill will toward plaintiffs and in conscious disregard of plaintiffs' rights did not satisfy specific pleading requirement]

In the motion at bench, Defendants correctly argue that breach of the warranty of habitability (the first cause of action) is a contract cause of action. See *Axis Surplus Ins. Co. v. Reinoso* (2010) 208 Cal.App.4th 181, 184-185. It is axiomatic that punitive damages cannot be awarded for breach of contract. [*Myers Bldg. Indus., Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949] As for breach of the covenant of quiet enjoyment (second cause of action), this is a contract cause of action as well. See *Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281. Therefore, punitive damages do not lie.

As for the negligence cause of action (fourth cause of action), ordinary negligence will not support a claim for punitive damages. See *Jackson v. Johnson* (1992) 5 Cal.App.4th 1350, 1354. However, intentional infliction of emotional distress is an intentional tort and thus, will support a claim for punitive damages. See CACI No. 1602 defining "outrageous conduct." But, nuisance (the third cause of action) may be either a negligent or an intentional tort, and if the latter, then exemplary damages are recoverable when the facts warrant it. [*Stoiber v. Honeychuck* (1980) 101 Cal. App. 3d 903; *Hassoldt v. Patrick Media Group, Inc*. (2000) 84 Cal. App. 4th 153; and *Hutcherson v. Alexander* (1968) 264 Cal. App. 2d 126]

The First Amended Complaint is not a "model of pleading clarity", but a careful examination of the "litany" of defects indicate that 5 units have inoperable smoke or carbon monoxide detectors; 2 units have no working smoke detectors; 5 units have inoperable heaters; and 3 units have defective locks. See ¶ 16 of the First Amended Complaint. These allegations rise to the level of a conscious disregard for the safety of the tenants. This is sufficient to state a claim for punitive damages. See *Taylor v. Superior Court* (1979) 24 Cal.3d 890 at 896. Although no opposition was filed, it is the policy of the law is to construe the pleadings "liberally … with a view to substantial justice" (CCP § 452). Therefore, the motion will be denied.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this

tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 6/15/16 .
(Judge's initials) (Date)